(4)

No. 04-1257

In The
Supreme Court of the United States

FRANCES D. KETTENBACH,

Petitioner,

v.

RAFAELE LORAINE DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS AND NEXT FRIEND OF VANESSA EVAN DEMOULAS, DIANA D. MERRIAM, FOTENE J. DEMOULAS, ARTHUR S. DEMOULAS AND EVANTHEA DEMOULAS,

Respondents.

On Petition For A Writ Of Certiorari To The Appeals Court For The Commonwealth Of Massachusetts

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Although the petitioner believes that her contentions were fully presented in her petition for certiorari, the respondents Diana D. Merriam and others (hereinafter, Demoulas respondents) and Rafaele Lorain Demoulas (hereinafter, Rafaele Demoulas) have raised several matters in their separate briefs that deserve and require treatment in this reply brief.

DISCUSSION

I. THE PRIVATE INVESTIGATION OF ALLEGED JUDICIAL BIAS YIELDED FINDINGS SUPPORTIVE OF THE PETITIONER'S CONTENTIONS

The Demoulas respondents describe (Brief, pp. 3-4 & n.1) a scheme ("ruse") which involved three of the attorneys who represented the defendants in earlier phases of this litigation, and which resulted in bar disciplinary proceedings. Unsurprisingly, the respondents omit mentioning that, however one may characterize these attorneys' conduct, the lengthy disciplinary hearings produced clear findings of fact corroborative of Judge Lopez's bias against the petitioner. The hearing officer for the Massachusetts Board of Bar Overseers wrote:

> "I find that [the clerk, Paul Walsh] did tell Curry and LaBonte that Judge Lopez was biased and predisposed to the plaintiffs. . . . I also find that Walsh told Curry and LaBonte that Judge Lopez told him before the trial began who the 'good guys and bad guys' were and who the 'winners and losers' were going to be."

Bar Counsel *vs.* Kevin P. Curry & others, Board of Bar Overseers File Nos. C1-97-0602, C1-97-0589, C1-97 (9) 589, Special Hearing Officer's Report, par. 175 at p. 53 (May 11, 2005), at <http://www.mass.gov/obcbbo/highlit.htm.>[1] The defendants' third recusal motion, based on the information Walsh had imparted, was denied by Judge Lopez, R. App. at 90, 451, and her ruling was affirmed by the Supreme Judicial Court, *Demoulas* v. *Demoulas*, 432 Mass. 43, 55, 732 N.E. 2d 875, 884 (2000).

II. THE RESPONDENTS IGNORE THE SUBSTANTIAL AND RECURRING IMPORTANCE OF THE FEDERAL QUESTION PRESENTED IN THIS CASE

The respondents claim that the petitioner advances no compelling reason for this Court to grant review. Demoulas respondents' brief, pp. 4-6. Rafaele Demoulas's brief, pp. 5-6. They choose to ignore several points of conflict in State and Federal decisional law that warrant review by this Court. These are *first* and foremost, the conflict between Massachusetts judicial recusal procedures and the decisions of this Court articulating due process principles. See Petition for a Writ of Certiorari (hereinafter, Petition), pp. 11-14. *Second*, the Demoulas respondents disregard the conflict between judicial decisions in Massachusetts and the decisions in those States recognizing that the appearance of bias or impropriety, as distinct from actual bias or impropriety, is sufficient to implicate Federal due process rights. See *Commonwealth* v. *Brandenburg*, 114 S.W. 2d

[1] If Judge Lopez made these statements to Walsh, she would have made them at approximately the time she denied the first recusal motion. R. App. at 152-153.

830 (Ky. 2003); *Wolfkill Feed & Fertilizer Co.* v. *Martin*, 103 Wash. App. 836, 14 P.3d 877 (2000); *Brengelmann* v. *Land Resources of New England & Canada, Inc.*, 393 A.2d 174, 178 (Me. 1978). Compare *Lena* v. *Commonwealth*, 369 Mass. 571, 575, 340 N.E. 2d 884, 886-887 (1976) (appearance of impropriety as a ground for disqualification not constitutionally based). Compare also *DelVecchio* v. *Illinois Dept. of Corrections*, 31 F.3d 1363, 1380 (7th Cir. 1994), cert. denied, 514 U.S. 1037 (1995); *Johnson* v. *Carroll*, 369 F.3d 253, 260 (3d Cir. 2004), cert. denied, 125 S. Ct. 1639 (2005) (each interpreting decisions of this Court and concluding that the appearance of bias, without more, did not require recusal of a State judge under due process principles). The *third* area of conflict is between the Massachusetts decisions on this subject and the decisions in those jurisdictions recognizing that self-analysis by an obviously biased judge is impossible. *Surratt* v. *Prince George's County*, 320 Md. 439, 466, 578 A.2d 745, 758 (1990). *Gillum* v. *United States*, 613 A.2d 366, 369 (D.C. 1992). *In re International Bus. Machs. Corp.*, 618 F.2d 923, 926-927 (2d Cir. 1980). Contrary to the respondents' contention, the present case offers the opportunity for this Court to resolve fundamental conflicts affecting the scope of Federal constitutional protections afforded to litigants in State courts.

Equally unavailing is the respondents' effort to attach weighty significance to the fact that a different Superior Court judge (motion judge), and not Judge Lopez, ruled on the motions for relief from judgment.[2]

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[2] Judge Lopez had resigned after disciplinary proceedings against her before the Commission on Judicial Conduct arising from another case unrelated to the *Demoulas* litigation. The Commission's hearing

(Continued on following page)

Demoulas respondents' brief, p. 6. Rafaele Demoulas's brief, pp. 3-4. At the time the motion judge issued his ruling, Judge Lopez had already sat in judgment of her own challenged conduct on no fewer than three occasions. On any one or more of these occasions, her rulings may have been biased against the defendants, for the plain reason that her own sworn testimony before the Commission on Judicial Conduct revealed such bias and even paranoia. See, for example:

> " . . . I have been persecuted by some very powerful enemies I made in a very big case. And I'm sure you're not familiar with what I went through with the Demoulas losing side and their lawyers, but let me just tell you that there were many false complaints filed against – they suborned perjury, I was being followed, I had to have my house – the state police to come in and check for bugs in my house. They were going through my garbage."

Tr. Oct. 31, 2001, p. 154, R. App. at 743.[3]

Despite this statement of judicial bias, the motion judge ruled that "Judge Lopez's testimony before the Judicial Conduct Commission does not evidence any bias which may have affected her rulings." Petition, p. App.-3. Astonishingly, he reached this conclusion without ever hearing evidence that would have enabled him to determine at precisely what point in the litigation Judge

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officer found that she had violated several of the canons of judicial ethics and recommended a six months' suspension. Hearing officer's report, pp. 37-90, R. App. at 782-836.

[3] In this testimony, Judge Lopez did not attribute her views to any "outside sources." Compare Demoulas respondents' brief, p. 2.

Lopez's *admitted* bias arose. The motion judge's memorandum of decision strays even further afield by referring to "the false allegations against Judge Lopez by the defendants' attorneys" and "[Judge Lopez's] feelings about having her integrity unfairly challenged." *Ibid.* Whether the defendants' allegations were "false" or their challenges "unfair" were crucial questions of fact on which they were entitled to an evidentiary hearing. For the motion judge to refuse the defendants a hearing and then proceed to reach these conclusions was a blatant abuse of his discretion.

III. THE DEMOULAS RESPONDENTS FAIL TO DEMONSTRATE THAT THE MASSACHUSETTS APPEALS COURT'S DECISION RESTED ON ANY INDEPENDENT AND ADEQUATE STATE-LAW GROUND

The Demoulas respondents claim that the Massachusetts Appeals Court's decision rested on independent and adequate State-law grounds, and that review by this Court is thereby precluded. Demoulas respondents' brief, pp. 6-16. This contention should be summarily rejected.

A. The Defendants' Motions for Relief from Judgment Were Not Time-Barred Because the Defendants Were Seeking to Redress a Fraud Upon the Court

A claim of fraud upon the Court is not subject to the one-year limitation period prescribed by Mass R. Civ. P. 60(b), 365 Mass. 828 (1974), for certain categories of motions for relief from judgment. "Rule 60(b) places no time limitation on this ground." *Artco, Inc.* v. *DiFruscia*, 5 Mass. App. Ct. 513, 518, 365 N.E. 2d 832, 836 (1977).

Sahin v. *Sahin*, 435 Mass. 396, 405-406, 758 N.E. 2d 132, 140-141 (2001).

In a futile attempt to show that Judge Lopez's conduct was actually not a fraud upon the Court, the Demoulas respondents quote selectively and misleadingly from Massachusetts decisional law. They would maintain that fraud upon the Court can only occur in the conduct of a *party*. Demoulas respondents' brief, p. 10. However, the common law of Massachusetts recognizes that fraud upon the Court includes fraud committed by the Court itself, by its personnel, or by its officers. *MacDonald* v. *MacDonald*, 407 Mass. 196, 202, 552 N.E. 2d 533, 536 (1990). See *Pina* v. *McGill Development Co.*, 388 Mass. 159, 165, 445 N.E. 2d 1059, 1063 (1983) ("that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by *officers of the court* so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication") (emphasis supplied), quoted in *Paternity of Cheryl*, 434 Mass. 23, 35-36, 746 N.E. 2d 488, 498 (2001); *Sahin* v. *Sahin*, 435 Mass. 396, 406, 758 N.E. 2d 132, 140-141 (2001). These words describe precisely the conduct that Judge Lopez committed by failing to make timely disclosure of her bias against the defendants.

B. Law-of-the-Case Principles Would Not Be Applied

The Demoulas respondents cannot escape the fact that the Massachusetts courts treat the law-of-the-case doctrine as permissive, not mandatory. *Vittands* v. *Sudduth*, 49 Mass. App. Ct. 401, 414, n.19, 730 N.E. 2d 325, 337 n.19 (2000). See *Potter* v. *John Bean Div. of Food*

Mach. & Chem. Corp., 344 Mass. 420, 427, 182 N.E. 2d 834, 839 (1962) ("The judge was not obliged to apply that doctrine, which was permissive and not mandatory. His was the power to act to the end that a just result be reached"). The doctrine is inapplicable where, as here, new facts bearing on a previously decided issue are brought before the Court. *Conley* v. *United States*, 323 F.3d 7, 13 (1st Cir. 2003). No published Massachusetts decision remotely suggests that the law-of-the-case doctrine would ever be applied to preserve the handiwork of an admittedly biased judge who had thrice sat in judgment of her own challenged conduct.

IV. CONTRARY TO THE RESPONDENTS' CONTENTION, THE PETITIONER DID NOT WAIVE REVIEW OF HER CONSTITUTIONAL CLAIM BY FAILING TO PURSUE THAT CLAIM IN THE LOWER STATE COURTS

In adopting the Code of Judicial Conduct in 1972 as a rule of court, the Supreme Judicial Court sought to implement constitutional values in light of existing precedents. Notable among these were the decisions collected in *King* v. *Grace*, 293 Mass. 244, 200 N.E. 346 (1936), a case in which the Court, by Chief Justice Rugg, stated, "The provisions of our Constitution . . . are at least as rigorous in exacting the standards of judicial propriety as are those of the Fourteenth Amendment to the Constitution of the United States." 293 Mass. at 246, 200 N.E. at 348. In *Lena* v. *Commonwealth*, 369 Mass. 571, 340 N.E. 2d 884 (1976), and *Haddad* v. *Gonzales*, 410 Mass. 855, 576 N.E. 2d 658 (1991), the Court authoritatively construed Canon 3(C)(1)(a) (now 3(E)(1)(a)) of the Code and elaborated upon its provisions by laying down the recusal test that the

petitioner now challenges.[4] In view of these pronouncements by the Commonwealth's highest court, the Appeals Court would neither have altered the recusal test in the present case nor passed upon its constitutionality.

Furthermore, respected commentators acknowledge today that the ultimate rule-making power resides with the Supreme Judicial Court. See Robert J. Brink, The High Energy Years in Court Administration, a Conversation, 84 Mass. L. Rev. 137, 140 (1999). The Legislature, by Mass. Gen. L. c. 211, § 3, has conferred upon the Supreme Judicial Court the exclusive supervisory authority over inferior courts. The Appeals Court thus could not be expected to set aside on constitutional grounds a rule adopted by the Supreme Judicial Court, nor would it consider establishing procedural rules applicable to the lower courts. The inescapable conclusion is that, in the unusual posture of this case, further appellate review (discretionary review) by the Supreme Judicial Court was the only procedural vehicle realistically available to the petitioner for presenting her constitutional claim. The respondents have not shown that the petitioner waived review.

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[4] Although the Appeals Court quoted the *Lena-Haddad* recusal test in *Howe* v. *Prokop*, 21 Mass. App. Ct. 919, 920, 484 N.E. 2d 1029, 1031 (1985), the Court had no occasion to consider its constitutionality. Rather, the Appeals Court merely held that application of the rule that disqualifying bias "must arise from an extrajudicial source" did not abridge the appellant's State and Federal constitutional rights. Compare Demoulas respondents' brief, p. 17; Rafaele Demoulas's brief, p. 4.

V. THE MASSACHUSETTS RECUSAL PROCEDURE DIFFERS FROM THE FEDERAL SCHEME IN SIGNIFICANT RESPECTS

The statutory scheme governing recusal of Federal judges is contained in 28 U.S.C. §§ 144 and 455. The Demoulas respondents are plainly mistaken when they state (Brief, p. 20), relying solely on § 455, that the Massachusetts recusal test must satisfy constitutional requirements because it replicates Federal procedures which have not been subjected to constitutional challenge. Massachusetts does not have the equivalent of the disqualification mechanism afforded to Federal litigants by 28 U.S.C. § 144, which provides, in part:

> "Whenever a party to any proceeding in a district court makes and files a timely affidavit that the judge before whom the matter is pending has a personal bias or prejudice against either him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

A party may file only one such affidavit in a case. See *United States* v. *Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987); Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435, 1436-1441 (1966) (each describing the procedures to be followed under § 144). In the unlikely event that a first judge is disqualified under § 144 and a second judge turns out to have an apparent conflict of interest, a litigant must then fall back on § 455. The availability of recusal under § 144 points up a critical difference between Massachusetts practice and that of the Federal system. Massachusetts recusal jurisprudence rests entirely upon self-analysis by the challenged judge. A judge who, as did Judge Lopez, considers

the defendants in a case to be her "enemies" (R. App. at 743) cannot possibly be a fair and impartial judge. Massachusetts recusal practice falls short of fulfilling the due process requirement of "a fair trial in a fair tribunal" contemplated by this Court in *Withrow* v. *Larkin*, 421 U.S. 35, 46 (1975).

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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